No. 73-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, *Petitioner,*

v.

ITT CONTINENTAL BAKING COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether under a negotiated Federal Trade Commission consent order which requires a firm to cease from "acquiring" assets of other firms in the same industry, but which does not bar "holding" such assets, the Government may collect under the Clayton and Federal Trade Commission Acts not only initial single penalties for allegedly forbidden acquisitions but also continuing daily penalties for the holding of such assets?

2. Whether a negotiated FTC consent order which bars a firm only from "acquiring, directly or indirectly . . . the whole or any part of the . . . assets of any concern . . . engaged in the production and sale of bread" is violated by a firm which enters into a contract to supply bread to a producer and seller of bread who unilaterally decides to terminate production of bread and remain in business as an independent distributor?

3. Whether a negotiated FTC consent order which does not by its terms apply to "successors" may nevertheless be applied to an unrelated successor firm, where that firm acquires the firm subject to the order pursuant to an arms-length transaction causing substantial changes in owership and control, and where such acquisition is entered into without any purpose to evade the obligations under the order?

4. Whether the FTC may collect accumulating daily penalties for periods long after it has completed its investigation and concluded that there is a continuing violation of its consent order, when it has failed to inform the alleged violator of its jeopardy and mounting potential liability?

STATEMENT OF THE CASE

A. Background to the Court Proceedings

The consent order at issue in this case was the result of a complaint brought in 1960 by the Federal Trade Commission, pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, against Continental Baking Company ("Continental"). The complaint sought divestiture of certain companies acquired by

Continental, as well as other relief (App. 61-71).[1] Prior to any decision in the case, Continental and FTC complaint counsel agreed to a proposed consent order (App. 72-76). Continental agreed to a divestiture of certain assets and a ten-year prohibition on "acquiring, directly or indirectly, . . . the whole or any part of the stock, share capital, or assets of any concern . . . engaged . . . in the production and sale of bread and bread-type rolls" unless it obtained the prior approval of the Commission (App. 74).

The proposed order was "negotiated" by the parties (App. 31). It did not constitute an admission by Continental that any of its prior acquisitions were unlawful (App. 73). Nowhere did the proposed order purport to prohibit the holding, as opposed to the acquisition, of such stock or assets; the order did not purport to prohibit Continental from establishing distributorship arrangements with other bread companies; nor did the order purport to prohibit the acquisition of firms engaged only in sale, or only in production, of bread products.

The agreement containing the proposed consent order was followed by an "Appendix" which, in an effort to persuade the Commission to adopt the proposed consent order, set forth at length the background relating to the initial complaint and the proposed order (App. 77-84). As the wording of the document made clear, it did not purport to alter or to construe the terms of the consent order. Rather, its sole and stated purpose was to persuade the Commission "that this

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[1] "App." refers to the appendix filed in this Court. "Pet. App." refers to the appendix to the Government's certiorari petition, containing the decisions of the lower courts in this case.

consent order is in the public interest and should be issued by the Commission" (App. 84).

The hearing examiner recommended that the Commission approve the agreement and adopt the consent order (App. 85-89). *Continental Baking Company*, 60 F.T.C. 1183, 1191 (1962). On May 11, 1962, the Commission adopted the proposed order without change (App. 32). *Id.* at 1194.[2] The Commission, however, did not formally adopt the Appendix to the agreement and it is not reprinted with the order in the Commission's official report.

In 1965 Continental, without prior Commission approval, entered into a distributorship agreement with the Mack Baking Company ("Mack") of Bangor, Maine, an independent producer and seller of bread products, by which Mack became a distributor of Continental bread products (App. 132-34). Such distributorship arrangements permit a small baking company to provide products to its own customers on its own routes, while affording it the advantage of an assured supply and potential cost savings of high-volume production.[3] The Commission has never

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[2] The ten year ban on acquisitions expired on May 11, 1972, and the consent order accordingly is without present force or effect. The Commission has, however, under consideration an order to show cause why the ban on acquisitions should not be extended an additional period of years. *Continental Baking Company* (FTC Dkt. 7880).

[3] During the 1960's "skyrocketing" costs and other changes in the industry had produced a larger number of bakers and greater capacity than demand could absorb. FTC, *Economic Report on the Baking Industry* 4-7, 44-48 (1967). Although a small bakery company might be severely handicapped by low volume if it produced its own goods, its size would not necessarily be a sig-

challenged this agreement nor suggested that it was in any way a violation of the consent order (App. 52).

Thereafter, in 1965 and 1966 Continental entered into distributorship agreements with three small western baking companies, Bon Ton, Inc. ("Bon Ton"), Wyoming Baking Company ("Wyoming"), and Sheppard Baking Company ("Sheppard") (App. 94-99, 107-13, 117-21). The owners of each of these companies decided, on economic and personal grounds (App. 35-36, 40, 50), to terminate bread production but to remain in the bread business as distributors.[4] The agreements provided that Continental would supply bread products to the three companies for resale on their own routes and to their own customers (App. 36, 43, 50). None of the companies was competing with Continental when the agreements were made. The result of the agreements was that none of the three bakers was eliminated from the market, as each might have been without Continental's supply contracts. Each company maintained its own routes, its own customers, and full control over sales and employment policies (App. 38, 44, 51).

In 1966 and 1967 new circumstances affecting the owners of Bon Ton and Wyoming respectively led them to terminate their distributorship agreements with Con-

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nificant disadvantage on the distribution side of the business so long as its individual routes represented sufficient volume to occupy its trucks and drivers.

[4] Thus, for example, the proprietor of Bon Ton was "in his early sixties, had had serious medical problems in 1962 and 1963, and his family was urging him to get out of the bakery business. [He] faced a shortage of competent personnel, particularly in a supervisory capacity, and Bon Ton had sustained its first operating loss in 1964" (App. 35-36).

tinental (App. 39, 47-49),[5] and ultimately the distributorships were bought by Continental itself.[6] At the time of the sales, neither firm was engaged in the "production and sale" of bread products (App. 39, 49). Sheppard continues to operate as an independent dealership, but it terminated its supply agreement with Continental on May 12, 1973, and has since been supplied by a competitor of Continental.

In an arms-length merger on September 13, 1968, Continental's business operations and assets were taken over by a wholly-owned subsidiary of International Telephone and Telegraph Corporation ("ITT"), called ITT Continental Baking Company ("ITT Continental") (App. 32-33). It is stipulated that this merger was in no way entered into for the purpose of evading the obligations of the consent order (App. 33), and the transaction resulted in a complete change in ownership and control of Continental (App. 33-34). See pp. 50-1, below.

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[5] In early 1966 Bon Ton found itself confronted with a prospective competitive disadvantage with respect to its principal competitor; and in March 1966 Bon Ton's proprietor was hospitalized with a possible second heart attack and his family insisted that he get out of the distributorship (App. 38-39). The dissolution of the Wyoming distributorship developed from a dispute between the proprietor and Continental over the terms of the agreement, loan arrangements, and credit terms (App. 46-47).

[6] The Bon Ton distributorship was purchased directly from the proprietor at his urging (App. 39). In the case of Wyoming, Continental prevailed upon an existing distributor operating in another section of the country to take over the Wyoming distributorship, but the arrangement was not a financial success and Continental eventually purchased the Wyoming distributorship from its new owner (App. 49).

B. The Court Proceedings

Beginning in May 1966 the Commission undertook a fact-finding investigation of the Mack, Bon Ton, Wyoming, and Sheppard transactions (App. 51-52). Continental supplied the Commission with information respecting the distributorships, and investigational hearings were conducted and completed prior to June 1967 (App. 52).[7] Nevertheless, over a full year elapsed before the Commission without notice to Continental certified the facts, accompanied by a draft complaint, to the Attorney General (App. 52-53). At no point during this period was Continental advised that the Commission regarded any of the distributorship agreements as a forbidden "acquisition" or that it considered such an acquisition to make the company liable for ever increasing *daily* penalties (App. 52).

The first notice Continental had of the Government's position was the commencement of the present action in December 1968 in which the Government asserted that the Bon Ton, Wyoming and Sheppard transactions —but not the Mack transaction—were "acquisitions" forbidden by the consent order (App. 52).[8] Despite the Commission's failure to inform Continental of its jeopardy, the Government in the present suit demanded *daily* penalites of $1.000 from the date of Continental's agreement with each company to the date of the filing

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[7] The two investigational hearings occurred in May 1967 (App. 52) and the final request for information to Continental was received on May 12, 1967 (App. 52). There is no evidence that any subsequent fact-finding inquiry was conducted by the Commission into the relevant transactions.

[8] The suit was brought against ITT Continental. Continental had ceased to exist earlier in the year as a result of its merger into ITT Continental.

of the complaint (App. 19). Under the governing statutes, normally only one penalty of up to $10,000 can be assessed "for each violation" of a cease and desist order, but the provisions also permit daily penalties for a "continuing failure or neglect to obey" a final order.[9] As discussed more fully below, the Government here sought to justify daily penalties—totaling over $3 million—on the ground that the cease and desist order should be read to prohibit the "holding" as well as the "acquiring" of the proscribed assets.[10]

On the basis of the stipulation of facts filed by the parties (App. 29-60), the District Court found that the consent order could be "reasonably read" to permit the three challenged transactions, but that the Bon Ton and Wyoming agreements constituted "acquisitions" in violation of the order (Pet. App. 14A). The apparent basis for this finding was the court's view that Continental ultimately acquired "assets" of these two companies—in particular their "sales, sales routes and sales volume"—when the distributorships were taken over by it (Pet. App. 14A). The Sheppard transaction was distinguished since, among other differences, Con-

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[9] The parallel penalty sections of the Clayton and Federal Trade Commission Acts provide that violation of an FTC order gives rise to a civil penalty "of not more than $10,000 for each violation." Section 11(*l*), 15 U.S.C. § 21(*l*); Section 5(*l*), 15 U.S.C. § 45(*l*). Each section also provides that each separate violation is a separate offense "except that in the case of a violation through *continuing failure or neglect* to obey a final order . . . each day of continuance of such failure or neglect shall be deemed a separate offense." Id. (emphasis supplied). (The maximum penalty under Section 5(*l*) was $5,000 at the time of trial in this case and was subsequently raised to $10,000. 87 Stat. 591).

[10] The Government later also requested that the court order the divestiture of the three companies allegedly "acquired" by Continental (App. 27).

tinental did not acquire its route or customer lists. In drawing this distinction, the District Court necessarily rejected the Government's view that the distributorship agreements standing along comprised forbidden acquisitions.

Turning to the issue of penalties for the Bon Ton and Wyoming transactions, the District Court found "that the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order . . . did not constitute a 'continuing failure or neglect to obey' said order. Accordingly the government's demand for imposition of daily penalties . . . is denied. Once these two acquisitions were accomplished, the violations were complete" (Pet. App. 15A). Therefore, the court imposed on Continental single statutory penalties of $5,000 each for the Bon Ton and Wyoming "acquisitions" (Pet. App. 16A). The court also issued an injunction tracking the language of the consent order, but refused to order divestiture (Pet. App. 15A-16A).

With respect to Continental's contention that the Commission had unduly delayed in notifying Continental of its jeopardy, the court found it unnecessary to decide the issue in view of its holding that daily penalties could not be assessed under the consent order as written. The court stated, however, that "it would seem unreasonable to permit the commission to knowingly let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time" (Pet. App. 15A).[11]

[11] The court also stated that ITT Continental was a successor of Continental and that ITT Continental "assumed the liabilities of Continental Baking Company including the liabilities under

On appeal by both parties, the Tenth Circuit reversed the District Court as to the Sheppard transaction, but otherwise affirmed (Pet. App. 9A-10A). In substance, the Court of Appeals—in disagreement with the District Court—seemingly held that the distributorship agreements themselves constituted acquisitions whereby Continental "acquired" the "market and volume" of the bakeries in question (Pet. App. 7A).[12] Accordingly, the court remanded the case to fix a penalty for the Sheppard transaction in addition to the penalty already fixed for the other two transactions.

In affirming the District Court's ruling against the imposition of daily penalties, the Court of Appeals expressly relied upon *United States* v. *Armour & Company*, 402 U.S. 673 (1971), and *Hughes* v. *United States*, 342 U.S. 353 (1952), which held that in the interpretation of a consent order the scope of such an order " 'must be discerned within its four corners, and not by reference to what might satisfy the purposes of one

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the Federal Trade Commission consent order" (Pet. App. 16A). ITT Continental had admitted its liability for monetary penalties resulting from any violations of the consent order by Continental prior to the time Continental ceased to exist through its merger into ITT Continental. Although ITT Continental denied that it could be charged with penalties continuing after the date of the merger, the District Court had held that no daily penalties could be assessed under the consent order in any event, so the issue of post-merger penalties did not arise.

[12] Although this is what the Court of Appeals appears to say, the reasoning is not entirely clear from the opinion. It is plain that, under the terms of the consent order, Continental was prohibited from acquiring "stock" or "assets" of bakeries described by the order but it was not prohibited from serving the same market or the same customers.

of the parties to it' " (Pet. App. 3A). Accordingly, the court held that:

> "To consider the consent order 'within its four corners,' the wording is directed to the acquisition of businesses engaged in bread making, directly or indirectly. The only reference in the order is to the 'acquiring' of such businesses. . . .
>
> This consideration of the order leads us to agree with the trial court as to whether the violations found were continuing or not . . ." (Pet. App. 4A).

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents at the outset a single, narrowly focused question turning upon the construction of particular language used in a consent decree entered into between the FTC and Continental. The Government claims that under a consent order which prohibits only "acquiring" assets, ITT Continental is subject to daily penalties—as distinct from single penalties—for its continued "holding" of assets acquired in alleged violation of the order. Both courts below held, contrary to the Government's position, that a consent order which prohibits "acquiring" assets means just what it says, and cannot be modified under the guise of interpretation to extend to the "holding" of acquired assets.

The lower courts' conclusion accords with, and is directly supported by, this Court's recent decision in *United States* v. *Armour & Co.,* 402 U.S. 673 (1971), and the settled line of authority that it represents. *Armour* was the culmination of a series of Supreme Court cases which have established two requirements in the construction of consent decrees: first, that the explicit

language of a consent decree is the controlling guide to its interpretation; and second, that the language of a decree cannot be changed or distorted by virtue of an alleged "purpose" of the decree or of the underlying regulatory statutes. The Government's argument in the present case is clearly inconsistent with these principles.

In defiance of *Armour,* the Government virtually ignores the actual language of the consent order here involved. Indeed, its brief makes clear that it is urging this Court to construe the order to say that it prohibits the "retaining" or "holding" of assets even though the relevant paragraph of the order manifestly includes no such language. This effort to warp the language, which would be inappropriate even in statutory construction, is indefensible in construing a bargained-for consent agreement designed to compromise litigation.

The Government underscores its departure from *Armour* by permeating its brief with claims that its "interpretation" of the consent order will conform with the "purposes" of Section 7 of the Clayton Act and the order itself. If they do nothing else, *Armour* and its predecessors make one thing unmistakably plain: the "purpose" of the statute is an impermissible standard for interpretation of a consent order; and the consent order itself has no "purpose" other than to settle the case in accordance with its express terms.

Even were it relevant, the "purpose" of Section 7 does not support the result sought here by the Government. The "purpose" of Section 7 is to prohibit anticompetitive *acquisitions,* and neither *United States* v. *DuPont & Co.*, 353 U.S. 586 (1957), nor any other cited authority gives the statute any other reading. The

Government cannot escape the thrust of *Armour,* as it attempts to do, by fastening upon particular factual differences in the order there involved and disregarding the principles of construction which the Court there affirmed. Similarly, the Government's effort to show that the present consent decree does have a "purpose" to prohibit retention of assets must fail because the document relied upon to show such a purpose is a collateral document which in no way indicates an intention of the parties to prohibit the "holding" as well as the "acquiring" of assets.

Equally unpersuasive is the Government's claim that the legislative history of the civil penalty provisions requires that daily penalties be assessed in this case. In the first place, the refusal of the lower courts to grant the Government's demand for daily penalties was based not upon the penalty provisions, but on the plain language of the consent order. In addition, the legislative history of the penalty provisions proves that individual acquisitions were not the sort of inherently continuing failure to obey an agency command which the daily penalty provisions were intended to reach. On the contrary, the examples given in the legislative history shows that discrete transactions (*e.g.,* radio broadcasts in violation of an FTC false advertising order) fall outside the daily penalty provisions.

Finally, there is no basis for believing that parties subject to anti-acquisition orders will feel free to violate those orders unless daily penalties are assessed. The Commission may always demand full injunctive relief, including the drastic penalty of divestiture, for violations of such orders. Furthermore, if the Commission seriously fears disruption of its anti-acquisition orders, it has full statutory power to modify ex-

isting orders to include specific bans against "holding" as well as "acquiring" assets, and it may easily write all new orders to include such a ban.

What will truly disrupt the administration of FTC consent orders is the very approach urged by the Government in this case. By ignoring the plain language of the consent order in a search for a supposed "purpose" of the order or related legislation, the Government would foster needless and time consuming litigation at the expense of the certainty achieved by applying the *Armour* doctrine. And, if respondents know that a "limited" consent order for which they have bargained can later be "interpreted" to include entirely new prohibitions, they will have a strong incentive to litigate the issues in the first instance, with consequent overwhelming costs to the Government in time and resources.

Even if the Court determines that the consent order at issue does prohibit "holding" as well as "acquiring" assets, three additional grounds preclude or limit assessment of daily penalties against ITT Continental. First, the transactions challenged by the Commission are not violations of the consent order at all, since they did not involve forbidden acquisitions but rather involved distributorship agreements, an entirely distinct concept under the antitrust laws. Second, ITT Continental, as a bona fide and previously unrelated successor to Continental, cannot be bound by the terms of an order entered against Continental but not specifically against its "successors." Third, the Commission's unreasonable failure to notify Continental or ITT Continental of the Commission's position long after it had full knowledge of all relevant facts, precludes subsequent daily penalties.

These issues, which are discussed at greater length below, will not be reached if this Court sustains the lower courts' construction of the consent order. If, however, the lower courts' construction is reversed and the Government's position is accepted, then Continental is entitled to defend the refusal to assess daily penalties on any other ground sufficient to sustain it. *E.g.*, *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924). Each of the three reasons stated would independently justify the refusal of the lower courts to assess daily penalties in this case.[13]

II. WHERE A CONSENT ORDER BY ITS TERMS PROSCRIBES ONLY "ACQUIRING" ASSETS, THE "HOLDING" OF ACQUIRED ASSETS DOES NOT CONSTITUTE A CONTINUING VIOLATION OF THE CONSENT ORDER FOR WHICH DAILY PENALTIES MAY BE RECOVERED.

A. The Armour Decision and Similar Cases Require that the Language of a Consent Order Control Its Interpretation, and the Language of the Consent Order Here Involved Is Inconsistent with the Government's Interpretation.

In the recent case of *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), this Court summarized existing precedent and affirmed the dual principles that govern the interpretation and application of the instant consent order. The first is that the language of the order is the controlling guide to its interpretation; the

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[13] While the Government claims that these additional questions are not properly before the Court, it is apparent that all three questions may be determined here. Long-standing precedent and sound policy permit ITT Continental to raise any arguments in defense of the judgment below, even if such arguments are inconsistent with the reasoning of the lower court. Moreover, even if the Government's new standard were accepted by the Court, only the first of the three issues would be foreclosed. As to the second and third, there can be no doubt that they are appropriately raised as affirmative defenses to the Government's claim for daily penalties.

second, discussed more fully below (pp. 21-28, *infra*), is that unlike a statute a consent order cannot be extended by the modification of negotiated language in light of a supposed "purpose" of the order or of the underlying regulatory statutes. In emphasizing the first of these principles, the Court explained:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. . . . For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. *Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.*" *Id.* at 681-82 (emphasis supplied).

Here, the plain meaning of the order's language confirms that if the supply contracts with Bon Ton, Wyoming, and Sheppard were acquisitions at all, the acquisitions themselves were *single* violations of the order. The consent order itself speaks only of "acquiring" and "acquisition" of stock or assets.[14] The plain

[14] The relevant prohibition in the consent order states that Continental shall cease from "acquiring" specified stock or assets unless the Commission specifically chooses to permit "such an acquisition" in its sole discretion (App. 74). The ordering paragraph in question does not refer either to the holding or the retention of stock or assets.

meaning of those terms—not only in familiar speech, but as used by the courts—is the *act* of obtaining ownership or possession, to "get" or to "gain" as one's own. *See, e.g., Helvering* v. *San Joaquin Co.,* 297 U.S. 496, 499 (1936); *United States* v. *Hibernia Bank Bldg.,* 76 F.Supp. 18, 19 (E.D. La. 1948). Once ownership is obtained, the new owner does not "continue" to acquire the same property; once acquired, it is held or retained. Significantly, the Government pays scant attention to the language of the order, choosing instead —in plain contravention of *Armour*—to dwell upon its alleged "purpose."

The Government's basic position is that Continental violated the order by establishing distributorship arrangements with Bon Ton, Wyoming, and Sheppard, whereby each company distributed Continental products instead of its own. Such arrangements are not in any event "acquisitions" of assets. See p. 41-6 below. But assuming *arguendo* that the "market volume" of each company was an asset indirectly acquired by Continental, then the violation of the order occurred *at the point* the market volume was indirectly acquired.[15] Obviously, Continental could not thereafter "continue" to acquire the same assets it had already acquired. The only way in which a continuing violation could be found would be if, instead of banning only "acquiring" assets, the order specifically prohibited "holding" or "retaining" acquired assets as well.

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[15] As the District Court properly recognized in this case:

> "[T]he terms of the consent order proscribe only the act of acquisition and . . . the violations of the consent order . . . did not constitute a 'continuing failure or neglect to obey' said order. . . . Once these two acquisitions were accomplished, the violations were complete" (Pet. App. 15A).

An examination of the Government brief shows that the Government is attempting to add just such a prohibition to the order. Thus, it states that "[t]he issue presented by this case is whether the *retention* of assets acquired in violation of a Commission order prohibiting such acquisitions is a continuing offense . . ." (Gov. Br. 10) (emphasis supplied) and concludes that "[t]here is nothing in the Commission's consent order to show that it was intended to bar *only the acquisition* and not the *retention* of illegally-acquired assets" (Gov. Br. 24) (emphasis supplied). Certainly there is "nothing" to show such an intent, *except the express language of the order* which plainly prohibits acquisitions and does not even suggest that "retention" of assets is prohibited. One could not imagine a more candid admission than the above-quoted statements that the Government is attempting to rewrite the plain language of the consent order, in direct contravention of the principles of *Armour*.[16]

Armour does not stand alone in its requirement that the interpretation of a consent order be based on the plain meaning of the order's language. Established precedents in this Court and elsewhere have adhered to the same sound policy. *See, e.g., Hughes* v. *United*

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[16] Further evidence that the Government here is attempting to rewrite and not to interpret the order is the fact that where the Government has wanted to establish a prohibition against holding as well as acquiring assets, consent orders have so stated. *E.g., United States* v. *General Motors Corp.*, 1968 Trade Cas. ¶ 72,356 (N.D. Ohio 1968). The Government's claim that such cases are distinguishable because they involve judicial decrees, violations of which are punishable by contempt (Gov. Br. 20), is unpersuasive: familiar language does not mean one thing when used by an agency in an order enforceable by the court and something quite different when used by the court in its own decree.

States, 342 U.S. 353, 357 (1952); *United States* v. *Atlantic Refining Co.,* 360 U.S. 19, 23-24 (1959); *Artvale, Inc.* v. *Rugby Fabrics Corp.,* 303 F.2d 283, 284 (2d Cir. 1962); *United States* v. *ASCAP,* 331 F.2d 117, 123-24 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964).

The first case in which the Court spoke to the issue of consent decree interpetation was *Hughes* v. *United States, supra.* The Court there rejected the Government's argument that the Government's reading of the consent order was the only way in which the "purposes" of the decree could be achieved. While admitting that the "purpose" of the decree as stated by the Government might be frustrated, the Court held that once the parties entered an agreement they were bound by the language of that agreement, and that an attempt to "interpret" the agreement so as to create substantially new liabilities was in effect a modification of the original decree which could not be permitted. 342 U.S. at 357.

The Court returned to the issue in *United States* v. *Atlantic Refining Co., supra,* in which the Government claimed that its "interpretation" of the decree would be necessary to implement the purposes of the laws on which the decree was based. In rejecting this claim, the Court stated:

> "The Government contends that the interpretation it now offers would more nearly effectuate the 'basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike.' This may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues. And we agree with the District Court that accepting the Government's present interpretation would do just that." 360 U.S. at 23 (footnote omitted).

These cases represent wise policy, for they reflect the understanding that consent decrees are, like contracts, negotiated documents by which each party gives up some benefits in return for others. Accordingly, such documents must be interpreted, like contracts, in accordance with their agreed upon terms. Moreover, the tenets of *Armour* and its predecessors conform with the realities of the Government's own consent decree programs. As we show more fully below (pp. 32-6 *infra*), *Armour* by requiring adherence to the actual language of an order encourages companies to submit to negotiated decrees instead of forcing the Government to litigate the issues. As one leading authority has explained:

> "It must not be forgotten that the defendant, in reliance upon the terms of the consent decree, has bargained away its constitutional right to litigate the issue of liability. Thus, the government is able to obtain an "assured" and "immediate" result, without proof of the claims in the complaint —claims that, as one court has rightfully noted, might not be established at trial. Under these circumstances it would be unfair for a court to impose additional prohibitions solely on the basis of the government's claim that such relief is warranted to effectuate the decree's alleged purpose, when the defendant might never have entered the decree and, indeed, might have chosen to proceed to litigation had the government insisted on such relief in the first place. . . ." Handler, "Twenty-Fourth Annual Antitrust Review," 72 *Colum. L. Rev.* 1, 33-34 (1972) (footnotes omitted).

In this case, the task for the lower courts was one of simple construction. Thus, the courts were bound

to follow the time-honored principle reiterated in *Armour* that a consent order must be interpreted "as it is written" and not "as it might have been written." 402 U.S. at 681-82. The determination of both the District Court and the Court of Appeals that the prohibition against "acquiring . . . assets" forbade only the acquisition of assets is a clear and proper application of these established principles of construction.

B. The Armour Line of Decisions Precludes the Government's Attempt To Modify the Language of the Consent Decree by Relying on the Supposed "Purpose" of the Decree or of the Antitrust Laws.

The second prong of the *Armour* holding is the principle that the plain meaning of a consent order cannot be changed on the basis of its alleged "purpose" or the "purpose" of the underlying antitrust laws:

> "Naturally, the decree reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." 402 U.S. at 681-82.

The Government's position here is in direct contravention of this standard. Faced with the language of the consent order which yields no support for its attempted extension, the Government is forced to argue that the extension is justified by the supposed "purpose" of the order and of the antitrust laws: "such

remedial provisions [barring further acquisitions] have two broad *purposes*" (Gov. Br. 11); "Commission orders prohibiting acquisitions . . . are, *like Section 7, intended* to prevent the effects of an illegal acquisition" (Gov. Br. 14-15); "the *obvious purpose* of an order barring future acquisitions is to prevent the anti-competitive effect . . ." (Gov. Br. 16); "If the Commission order prohibiting future acquisitions is to perform a meaningful function in *effectuating the purposes of Section 7* . . ." (Gov. Br. 16); "The agreed *purpose* of the order . . . would be wholly defeated . . ." (Gov. Br. 17); "The Commission's order, no less than the underlying statute it implements, should be interpreted in a way that accomplishes rather than defeats its *purpose*" (Gov. Br. 19) (all emphasis supplied).[17]

The Government's contention that its "interpretation" of the consent order will effectuate its supposed purpose and the purpose of the antitrust laws is identical to the argument made by the Government and rejected by this Court in *Armour,* in *Hughes,* and in *Atlantic Refining.* See also p. 19, above. As the Court also noted in *Armour*—in language equally apposite here—the Government itself chose to bring suit under the decree and not under the antitrust laws. 402 U.S.

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[17] The Eighth Circuit's opinion in *United States* v. *Beatrice Foods Co.,* 493 F.2d 1259 (8th Cir. 1974), *petition for cert. pending,* No. 73-1798 (Gov. Br. 12), is faulty for the same reason. The court there disagreed with the decision in this case and upheld daily penalties assessed under an "acquiring" clause similar to the one here on the grounds that "[s]uch a limited construction of the order ignores the crucial effects of an acquisition . . ." and that the purposes of Section 7 of the Clayton Act would not be effectuated by such an interpretation. *Id.* at 1270. The court failed even to consider the *Armour* decision in this context.

at 674-5.[18] Accordingly, the test was what the decree meant and not what could be argued in a suit, which the Government remained free to bring, to enforce Section 7 of the Clayton Act. This Court stated in *Armour:*

> "[A]lthough the relief the Government seeks may be in keeping with the purposes of the antitrust laws, we do not believe that it is supported by the terms of the consent decree under which it is sought." 402 U.S. at 683.

Thus, even were the Government's analysis of the purposes of Section 7 correct—which it is not—the intent of that statute does not govern the proper interpretation of this specifically limited consent order. Even if Section 7 were intended to prohibit the retention of illegally acquired assets as well as the acquisition itself, here the consent order explicitly bans only "acquisitions." A consent order represents a specific compromise that may resolve the controversy far short of the relief the Government might have accomplished if it had pursued its case to hearing and prevailed on the merits; and in exchange for the assurance of the bargained-for relief, the Government nor-

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[18] The Court stated:

> "This case does not involve the question whether the acquisition of a majority of Armour stock by Greyhound is illegal under the antitrust laws. If the Government had wished to test that proposition, it could have brought an action to enjoin the acquisition under § 7 of the Clayton Act . . . . Alternatively, if the Government believed that changed conditions warranted further relief against the acquisition, it could have sought modification of the Meat Packers Decree itself. It took neither of those steps, but, rather, sought to enjoin the acquisition under the decree as originally written. Thus the case presents only the narrow question [of interpretation of the consent decree as written]." *Id.* at 674-75 (footnote omitted).

mally accepts somewhat less than it might have gained through litigation. Accordingly, what it has gained must be measured by the decree and not by the antitrust laws.

As it happens, the Government's analysis of Section 7 and the cases construing it is not persuasive. The Government asserts that Section 7 "must be construed to prohibit not just the acquisition but also the retention of the illegally acquired property, since it is that retention that gives rise to whatever anticompetitive effect the acquisition may have" (Gov. Br. 16). Yet there are many situations in which an acquisition does not result in a "retention of assets" yet has an effect on competition of the sort prohibited by Section 7. If, as has happened from time to time, a company acquired a competitor and immediately junked its assets, there would be no retention of assets; but surely Section 7 could be invoked to challenge the *acquisition's* impact on competition.[19]

This reading of Section 7 is supported, not contradicted, by *United States* v. *Du Pont & Co.,* 353 U.S. 586 (1957). Notably, the Government relies heavily on the view of the *dissent* in that case as to what the majority was holding (Gov. Br. 18). But the majority opinion did not consider that it was reading Section 7 to prohibit the retention as opposed to the acquisition of assets. As Justice Brennan stated the holding for the majority:

> "We repeat, that the test of a violation of § 7 is whether *at the time of suit,* there is a reasonable

[19] Conversely, unless there has been an "acquisition" within the meaning of Section 7, then clearly the statute has no application whatever competitive consequences may flow from the "holding" of property.

> probability that the *acquisition* is likely to result in the condemned restraints." 353 U.S. at 607 (emphasis supplied).

The fact that the Court found such a probability on the basis of post-acquisition developments does not change the stated principle that it was the acquisition and not the retention that Section 7 forbad. In short, even if *Armour* did not render the Government's argument irrelevant, its construction of the supposed "purpose" of Section 7 would not support its strained extension of the language of the consent order.[20]

The Government, obviously conscious of the principles reaffirmed in *Armour,* attempts to distinguish the present case in two principal respects. First, looking to the particular facts of *Armour,* the Government contends that the decree in *Armour* prohibited only certain behavior, and not all relationships between Armour and retail food businesses. Under the narrow terms of the decree, the fact that Armour was barred from acquiring a retail food business did not prevent a retail food business from acquiring Armour, even though the effect on the industry might be identical. Therefore, the Government claims, *Armour* would only be pertinent here if the Government sought under the consent order to prevent another firm from acquiring Continental. (Gov. Br. 23-25).

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[20] Equally irrelevant is the decision in *Gottesman* v. *General Motors Corporation,* 414 F.2d 956 (2d Cir. 1969), where the Second Circuit held only that the Government's judgment in the same *DuPont* case was entitled to greater weight than the trial court had given it in determining, not merely whether the 1917 stock acquisition violated the Clayton Act, but also whether there was any actual injury therefrom at any time for which the plaintiff was claiming damages.

The significance of *Armour,* however, is not merely that it interpreted the decree in a way other than that urged by the Government. Rather, the Court expressly rejected the Government's argument that the decree could be interpreted on the basis of a "purpose" either of the decree itself or of the antitrust laws on which it was based, and held instead that the consent order had to be interpreted "within its four corners" as a negotiated contract. Moreover, when read "within its four corners," the present order, like the order in *Armour,* refers only to specific behavior. Nowhere does it speak in terms of "relationships" between Continental and other baking companies. Finally, the "harm" which the Government asserts will occur in the present case is identical to that claimed by the Government in *Armour:* in each case the Government argued that a company subject to a consent decree could avoid the "purposes" of the order. And, in each case, the consent order "as written" could not be read to achieve the Government's "purposes" without ignoring its plain language.

In a second attempted distinction, the Government asserts that the consent order here involved differs from the *Armour* order because the present order does have a "purpose" that can be discerned from the "Appendix" to the parties' settlement agreement.[21] The

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[21] This argument is at odds with the Government's consistently expressed concern (*e.g.*, Gov. Br. 12) that the Tenth Circuit's decision will have a serious adverse effect on the Commission's antiacquisition program. It would not assuage this concern for the Government to prevail in this case on the basis of a collateral document peculiar to the consent order here, and presumably the Government did not petition this Court to review so unique and limited a question.

Appendix, as already noted, does not purport to provide a gloss for interpreting the decree but merely sets forth the background to provide the Commission a basis for approving the consent order. *See* p. 3, above. More important, after asserting that "the tendency toward concentration" is one of the problems facing the baking industry, the Appendix merely states that, in addition to requiring one divestiture, the order would bring to a halt Continental's prior practice of "acquiring" companies baking and selling bread (App. 84). There is nothing in these general statements to show that the consent order was intended to forbid anything other than acquisition of stock or assets.[22]

The existence of the Appendix militates against rather than for the Government's position in another respect. In *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F.2d 283 (2d Cir. 1962), the parties agreed to both a consent order and a separate agreement explaining the settlement. The court upheld the lower court's decision that the defendant had not violated the consent order by selling fabrics similar but not identical to those made by using plaintiff's patents. The court agreed with the plaintiff that the "spirit" of the agreement as manifested in the collateral document was broader than the exact words of the consent order, but

[22] The Government's attempt to isolate and emphasize the phrase relating to "concentration" is faulty for another reason as well. Not only does it ignore the particular means specified in the consent decree—the limit on acquisitions—but it implies an impossibly vague and expansive scope of the order. Obviously, Continental did not agree to forego every step or method of expanding its business(*e.g.*, better advertising, new banking techniques, growth in new territories) even though any of these steps might equally increase "concentration" in the industry.

held that this fact bolstered the court's interpretation of the decree based on its express terms:

> "They show, however, that broader terminology was available to the parties had they chosen to use it. The actual choice of language in the decree, therefore, is highly significant." *Id.* at 284.

Accordingly, even if the Appendix to the agreement embodying the consent order were read more broadly than the order, this would show only that Commission counsel and Continental could use broader language when they so chose, but failed to include such language in the order as finally agreed upon.

C. The Legislative History of the Civil Penalty Provisions Does Not Support the Government's "Interpretation" of the Consent Order.

The Government asserts, incautiously, that the legislative history of the penalty provisions "confirms" that each day of "retention" of assets acquired in violation of Commission order is a separate offense (Gov. Br. 21). However, since the lower courts concluded that the consent order did not prohibit the "retention" of assets, legislative history could not assist the Government on any view of the matter. In short, it was the limited language of that order, not the language of the civil penalty provisions, which precluded the Government from assessing daily penalties here.

The legislative history, so far as it casts any light on this case, strongly supports the view of the lower courts that the daily penalty provisions do not apply to the alleged violations here involved. The basic rule established by the penalty provisions of the Clayton and Federal Trade Commission Acts has always been to make "each violation" subject to a single penalty, which can now amount to $10,000 per violation. See

p. 8 above. The daily penalty provisions were added to each of the statutes long after their enactment not to replace the single penalty provisions but to supplement them by providing daily penalties in a narrow and comparatively unusual class of cases.[23]

As the language of the daily penalty provisions shows, daily penalties are permitted *only* where the violation constitutes a "continuing failure or neglect" to obey an order. The legislative history confirms what this language suggests, namely, that the daily penalty provisions were directed to that class of violations which were inherently continuing in nature and would, at least in the normal case, take the form of a refusal or failure to perform an affirmative act. Thus, the then General Counsel of the FTC explained, at the time that the daily penalty provision was added to the Federal Trade Commission Act in 1950, that its "principal value" would be to enforce Commission orders against "continuing conspiracies" such as "a continuing conspiracy to fix prices or control production."[24] The only other example given involved the maintenance of a billboard in defiance of an order prohibiting false advertising. *Id.*[25]

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[23] Although the single penalty provision was added to the Federal Trade Commission Act in 1938, the daily penalty provision here relied on by the Government was not added until 1950. 64 Stat. 21. The corresponding daily penalty provision was added to the prior single penalty provision of the Clayton Act in 1959. 73 Stat. 243.

[24] Letter from the FTC General Counsel to Senator Fulbright, quoted in full at 96 Cong. Rec. 3026-27 (1950). It was the General Counsel who drafted the daily penalty provision. *Id.* at 3027.

[25] The General Counsel contrasted this example, where daily penalties would be applied, with individual radio advertisements, where each broadcast would be an individual violation subject to a single penalty. *Id.*

In 1959, when the same daily penalty provision was added to the Clayton Act, the same examples were brought to the attention of Congress. *Hearings on the Finality of Clayton Act Orders Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 86th Cong., 1st Sess. 21 (1959). The House Report on the bill referred in addition to two other related instances in which the daily penalty provision might be invoked "for a continuing offense": the report explained that the failure to obey "an order dissolving an unlawful merger" would be subject to daily penalties, and it gave as a related example an order directed against an interlocking directorship. H.R. Rep. No. 580, 86th Cong., 1st Sess. 7 (1959). These examples confirm that the focus of the daily penalty provision was upon inherently continuing conduct.

There is, quite plainly, nothing inherently continuing in the act of "acquiring" stock or assets in violation of an outstanding Commission order prohibiting the "acquisition." As the District Court stated in this case, once the allegedly unlawful acquisitions "were accomplished, the violations were complete" (Pet. App. 15A).[26] If anything, the individual acquisitions al-

[26] The Government argues that if "Congress intended that failure to obey a Commission order dissolving an unlawful merger was a continuing offense, *a fortiori* it would be a continuing offense to retain assets acquired in violation of an outstanding order prohibiting their acquisition" (Gov. Br. 22). The argument is a *non sequitur.* In one case the violation consists of acquiring assets, a discrete act which is completed when the assets are acquired; in the other instance, the violation consists in refusing to dissolve a merger, which is precisely the kind of inherently continuing refusal to act that the daily penalty provisions were intended to reach.

For the same reason, *United States* v. *Schine,* 260 F.2d 552 (2d Cir. 1958), *cert. denied,* 358 U.S. 934 (1959), is inapplicable to the present case. In *Schine,* the court merely upheld contempt con-

legedly violating the Commission's order are very much like individual radio broadcasts in violation of a Commission order against false advertising, and the legislative history shows quite clearly that such a case was not covered by the daily penalty provision but rather by the basic rule that each broadcast constitutes a separate, individual violation. See p. 29 n. 25 above.

Finally, the legislative history of the daily penalty provisions repeatedly emphasizes that the daily penalties were intended for a *narrow* class of violations. Thus, the General Counsel of the Commission, supporting the 1950 amendment, stated that the new language applied solely "in those infrequent cases" where the violation was a continuing one. 96 Cong. Rec. 3026 (1950). In 1959, a subsequent General Counsel, supporting the Clayton Act amendment, responded as follows to Congressional concern that daily penalty provisions might be used to amass huge penalties without giving respondents fair notice of their potential liability:

> "So far, since the passage of the [daily] penalty provision in the Wheeler-Lea Act [in 1950], we have found no continuing day-by-day offenses upon which we have sued. . . . *It is an unusual* thing, so we haven't yet brought any suits on the basis of a continuing offense day by day." *Hearings on the Finality of Clayton Act Orders, supra,* at 21 (emphasis supplied).[27]

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victions for violation of an order in a Sherman Act case, based on the defendants' failure to divest properties as required by the decree and their continuation of other activities whose continuation was barred by the decree.

[27] The Congressional concern regarding the notice problem is underscored by this very case, where the Commission failed to notify Continental of its rapidly increasing liability despite the

It is clear, then, that the civil penalty provisions were intended to apply only to those unusual situations where the violation is an inherently continuing course of conduct. The instant situation manifestly does not present such unusual circumstances, and the Government's reliance on the history of the penalty provisions is misplaced.

D. The Government's Approach to "Interpreting" Consent Orders Will Thwart Rather Than Serve the Effective Operation of Its Consent Order Program.

In addition to its claim that daily penalties will effectuate the purposes of the decree and the antitrust laws, the Government asserts that the lower courts' decision will impair the Commission's anti-acquisition program (Gov. Br. 12-14). Such a contention cannot withstand scrutiny.

In the first place, the Government's professed concern that the lack of daily penalties under its anti-acquisition orders will result in widespread violations of those orders is based on a wholly unwarranted assumption that respondents to its orders are eager to violate the law in the absence of devastating monetary penalties. Despite the many outstanding orders forbidding acquisitions (*see* Gov. Br. 12), the Commission has not shown any pattern of widespread disobedience.[28] The Government's assumption is particularly unjusti-

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Commission's knowledge of all the facts of the challenged transaction over a year before the filing of the complaint. See p. 7 above.

[28] So far as we are aware, this case and *United States* v. *Beatrice Foods Co.*, *supra*, are the first cases in which the FTC has ever sought to collect daily penalties for alleged violations of its anti-acquisition orders.

fied by the record in the present case, since the District Court expressly found that Continental's actions were based on a "reasonable," if mistaken, reading of the consent order.

Equally unsound is the Government's asserted fear that the Commission's power to seek full injunctive relief, including divestiture, is an ineffective sanction as compared to purely monetary penalties (Gov. Br. 13-14). There are, no doubt, difficulties in implementing divestiture which may lead courts to apply such a sanction cautiously. But surely the risk of a fine of up to $10,000 coupled with the permanent loss of a profitable and fully integrated acquisition is a powerful deterrent to wanton violations of anti-acquisition orders.[29]

If daily penalties were in fact critical to enforcement of anti-acquisition orders, the Commission could readily provide for them without undertaking to distort the language of existing decrees. For decrees issued hereafter, it would be both remarkable and perverse if the Commission failed to insist on broader language prohibiting both "acquiring" and "holding" of forbidden stock or assets. As for decrees already outstanding, the Commission is always free to utilize its power to "modify" existing orders, after appropriate proceedings, to include an explicit ban on the continued holding as well as the acquisition of assets. 15 U.S.C. §§ 21(b),

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[29] In point of fact, the Commission can utilize contempt proceedings to punish respondents who violate cease and desist orders where the Commission has obtained a court order enforcing its cease and desist order. In such contempt proceedings, even criminal penalties are available.

45(b).[30] The fact that it has not done so, to our knowledge, deprives its "policy" arguments of any remaining force they might otherwise have had.

In actuality, policy considerations, invoked by the Government in support of its position here, militate far more strongly against its attempted rewriting of the consent order. It is well recognized that the consent order procedure is as much, if not more, a benefit to the Government as to defendants. By passage of Section 5(a) of the Clayton Act, 15 U.S.C. § 16, Congress gave statutory sanction to consent decrees by exempting them from use as prima facie evidence against the defendant in civil antitrust actions. The clear purpose of this exemption is to induce defendants to submit to consent judgments so that the Government may avoid the risk and expense of litigation. *See, e.g., General Electric Co.* v. *City of San Antonio,* 334 F.2d 480, 486 (5th Cir. 1964) ("the obvious purpose and function of the proviso of Section 5(a) is to encourage capitulation by the trusts, thereby saving the government great expense . . . ."); *Deluxe Theater Corp.* v. *Balaban & Katz Corp.,* 95 F.Supp. 983, 986 (N.D. Ill. 1951). As intended, the congressionally sanctioned consent decree has become the primary tool of Government antitrust enforcement. Note, 73 Colum. L. Rev. 594 (1973) (70 to 80 percent of Justice Depart-

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[30] The Commission is presently conducting a proceeding to consider a purported "modification" of the consent order here involved, which expired in 1972, to extend its term. *Continental Baking Company,* (FTC Dkt. 7880). ITT Continental is opposing this "modification" on grounds not involving the meaning of the "acquiring" clause at issue in the present case. It is noteworthy, however, that the Commission is seeking to extend the order's prohibition while at the same time it is here claiming that the prohibition has been rendered useless.

ment antitrust complaints terminate in consent decrees).

It is thus of paramount importance that the Government not create substantial disincentives to defendants negotiating such antitrust settlements whether in the Commission or in the courts. As the Second Circuit recognized in *United States* v. *ASCAP,* 331 F.2d 117, 123-24 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964):

> "It is important to the obtaining of consent decrees, *on which the effective enforcement of the antitrust laws depends in no small degree,* that defendants who sign them should know these will not be stretched beyond their terms" (emphasis supplied).

The present attempt of the Government to have the court read "acquiring" to mean "acquiring and continued holding" of assets is just such an example of an attempt to stretch a consent order beyond its terms. If, under the guise of interpretation, consent orders can be substantially modified in this fashion, companies faced with future anti-acquisition orders will have a strong incentive to litigate in the first instance rather than compromise.

The Government's approach would undermine the consent decree process in an additional respect. Under *Armour,* the meaning of the decree can normally be ascertained by examining its plain language. Under the Government's approach, however, all certainty is lost because construction of the decree would always be open to disputes based on will of the wisp conjectures about the "purpose" of the decree, the "purpose" of the statute, and such other extraneous factors as either side chooses to invoke. This process not only

discourages settlements, but it makes every settlement which is reached the occasion for still further litigation, burdening the courts and the litigants alike. Thus, it is the Government's position here, and not the Tenth Circuit's decision, that would result in serious adverse effects for the Commission's own enforcement program.

III. EVEN IF THE CONTINUED HOLDING OF ACQUIRED ASSETS CONSTITUTES A CONTINUING VIOLATION OF THE PRESENT CONSENT ORDER, THE GOVERNMENT CANNOT ASSESS DAILY PENALTIES IT CLAIMS AGAINST ITT CONTINENTAL.

A. ITT Continental Is Entitled To Raise Each of the Three Issues Set Forth Below.

If the Court agrees with the District Court and the Court of Appeals that daily penalties cannot be assessed in this case in light of *Armour* and the express terms of the consent decree, then this case is at an end. If, however, the Court accepts the Government's position that daily penalties are permitted, then it will be necessary for the Court to consider the three additional issues set forth below which raise alternative grounds for denying or limiting the daily penalties sought by the Government. These questions are: (1) whether the three distributorship contracts in question were acquisitions; (2) whether daily penalties can be assessed against a bona fide and previously unrelated successor to the company charged with violations; and (3) whether the Commission's failure to notify ITT Continental of its mounting liability precludes or limits daily penalties.

The Government's brief asserts (Gov. Br. 25-27) that the first two issues are not before the Court because ITT Continental did not cross-petition for certiorari and its arguments if accepted would result not

in affirmance but in modification of the Court of Appeals' judgment. As to the third issue, the Government states (Gov. Br. 27) that this Court "need not" consider it because any failure of the Commission to give prompt notice of its position may be considered by the District Court on remand in its discretionary determination of the amount of the daily penalties.

The Government's position that the first two questions may not be considered in the absence of a cross-petition is inconsistent with the position it took only last year, and presents an important question of Supreme Court practice that must be resolved if the Court should sustain the Government on the *Armour* issue discussed above.[31] Until recently, it appeared to be well settled under long-established precedents that ITT Continental could, without cross-petitioning, make any argument it wished to sustain the judgment below or to limit the scope of any modification or reversal.[32]

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[31] Whether a cross-petition is needed when a respondent does not seek to overturn the judgment below but simply to sustain it on alternative grounds or limit the impact of reversal is discussed in detail in a recent article by a leading expert on Supreme Court practice. Stern, "When to Cross-Appeal or Cross-Petition—Certainty or Confusion?," 87 Harv. L. Rev. 763 (1974). Stern not only shows that the Government's present position is contrary to precedent and sound policy, but observes that the Government took essentially the opposite position in *Strunk* v. *United States*, 412 U.S. 434 (1973).

[32] The leading cases are *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-36 (1924); *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931); *Morley Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937). *American Express* was cited only recently in *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970), and the rule it espouses has been regarded as settled by numerous commentators. See authorities cited in Stern, *supra*, 87 Harv. L. Rev. at 763 n.2.

Under this principle the respondent is entitled to advance his alternative arguments even though they "may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Express Railway Co., supra*, 365 U.S. at 435. It is thus only where the respondent seeks to have this Court overturn an adverse portion of the judgment entered below that the respondent must file his own petition. In this case, ITT Continental is not seeking to challenge the three single penalty judgments sanctioned by the Court of Appeals, but merely resisting or seeking to limit the assessment of *daily* penalties against it above and beyond the single penalties adjudged below.

In seeking to foreclose the alternative arguments made by ITT Continental, the Government relies on three recent decisions of this Court which it reads as establishing a limitation on the general principle established in *American Express*.[33] The Government's reading of these cases would establish a limitation on the

[33] *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973); *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52 n. 4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4 (1970). These decisions can be read in several different ways (see Stern, *supra*, 87 Harv. L. Rev. at 769-70) and the result reached is consistent with the undisputed rule that this Court is always free as a matter of discretion to refuse to consider a question otherwise properly presented (*e.g.*, because it is frivolous or has no general importance). No one can reasonably suggest that any of the three alternative grounds here involved present issues which are frivolous or unique. The first issue could arise under any order forbidding "acquisitions," and the Government has itself shown that numerous such orders are outstanding (Gov. Br. 12). The other two issues, involving the liability of successor corporations and the consequences of a failure of the Commission to give timely notice, could also arise in any number of cases involving Commission orders.

general principle of *American Express* that is neither unsound nor workable: it would result in a flood of unnecessary cross-appeals and cross-petitions to protect against a possible waiver under the new limitation; it would deprive respondents having entirely meritorious alternative defenses of a just result; and it would establish a new governing principle that would be very difficult to apply in practice and would itself generate new litigation without serving any useful purpose.[34] Accordingly, the Government's reading of these cases should be rejected and the long established principle of *American Express* should be reaffirmed.

Even if the Government's proposed limitation were sound, which it is not, it demonstrably would apply only to the first issue raised by ITT Continental and not to the second or third.[35] The limitation advanced

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[34] These considerations are developed by Stern with such persuasive force that it is unnecessary to elaborate them here. See 87 Harv. L. Rev. at 772-77. It is, however, worth repeating Stern's observation that the principal victim of the distinction now urged by the Government would be the Government itself; for, the necessity to cross-petition in order to reserve alternative grounds to sustain the result below would bear most heavily on the Government, which is confronted with more than a thousand certiorari petitions every year. *Id.* It would be of no benefit to the Government (or this Court) to establish a rule that required the Government to screen hundreds of individual cases in advance of certiorari to identify all alternative grounds and then to file numerous protective cross-petitions for certiorari.

[35] Even the Government does not suggest that a cross-petition is always necessary to reserve and present alternative grounds for affirming the decision below. The distinction it seeks to draw is between grounds that would logically lead only to affirmance and grounds that in logic would result "not in affirmance but in substantial modification" of the lower court's judgment (Gov. Br. 25).

by the Government would apply only where as a logical matter accepting an alternative ground raised by a respondent would not only uphold the judgment so far as it favored respondent but would also permit in theory modifying the judgment below to deprive the petitioner of what it had won. Acceptance of ITT Continental's second and third grounds clearly would not have such an effect: even if both arguments were accepted, the single penalties established by the Court of Appeals' judgment would remain standing, and the only result of the arguments would be to preclude or limit the Government's collection of daily penalties, which the lower courts did not award. Even by the Government's own standard, therefore, these two arguments must be faced on the merits if the lower courts' construction of the consent order is set aside.

The Government's contrary argument regarding ITT Continental's second ground rests on a misunderstanding of what respondent has argued. The Government asserts that "if ITT Continental is not a successor of Continental, then, theoretically at least, no penalties should have been assessed against it" (Gov. Br. 26). This is incorrect because ITT Continental has never denied that it is liable for any debts or penalties owed by Continental for its acts prior to the merger; the alleged acquisitions here occurred prior to the merger; and accordingly acceptance of ITT Continental's argument on a successor's liability would not result in disturbing single penalties established by the

ITT Continental does not, of course, request any modification of the judgment below; but the Government's position apparently is that, in logic, an acceptance of ITT Continental's first argument that no violations existed would theoretically permit a reversal of the single penalties imposed below, as well as a refusal to assess daily penalties.

lower court. Instead, the only result would be to preclude the Government from obtaining daily penalties from and after the date of the merger.

With respect to the third ground, the Government does not pretend that consideration is precluded but merely says that the Court "need not" reach the issue since the District Court could on remand reduce the amount of penalties to compensate for any unreasonable delay by the Commission in giving notice of its position (Gov. Br. 27). This contention misconstrues the thrust of ITT Continental's argument, which is that the Commission is barred as a matter of law from asserting daily penalties after the time at which it should have notified Continental of its jeopardy. Such a legal determination is entirely independent of the trial court's discretionary power to reduce the penalty and should logically be considered before any such exercise of discretion is undertaken.

B. None of the Three Distributorship Arrangements With Former Producers and Sellers of Bread Constituted an "Acquisition" Under the Terms of the Consent Order.

In holding that the Bon Ton, Wyoming, and Sheppard supply contracts violated the consent order, the Court of Appeals found that in each of the three transactions Continental indirectly acquired "the market and volume . . . a principal asset" of each bakery (Pet. App. 7A). It thus adopted the Government's position that the distributorship arrangements themselves comprised a forbidden acquisition. This holding is manifestly incorrect.

That Continental did not "acquire" any assets of the three bakeries in violation of the consent order is most apparent from an examination of the Sheppard trans-

action. The owner of Sheppard, Mr. Hebert, had decided for his own reasons to go out of business (App. 50). After unsuccessful efforts to sell the entire business to other companies, he decided to abandon production but to remain in business as a distributor and sell (*id.*). This decision led him to seek the supply contract with Continental which the Court of Appeals found to be a violation of the consent order (*id.*). Under this contract Continental, which had previously supplied Sheppard with cake products, undertook to supply its needs for all bakery products, including bread and rolls (App. 49-50). After the agreement was signed, Continental-labeled products generally replaced Sheppard-labeled products in Sheppard's trading area. Yet Sheppard remained and continues today to be a separate and independent company, selling bakery poducts on the same routes and to the same customers as it had prior to the distributorship agreement (App. 51). Sheppard's market volume is its own and forms the basis of its profit or loss. In fact, when in 1973 Sheppard became dissatisfied with ITT Continental's service under the distributorship contract, it terminated that contract and since then has bought its products from a competitor of ITT Continental.

To hold on these facts that Continental violated the consent order would require a total distortion of the normal meaning of the term "acquisition." In doing so, the Government is attempting to equate two familiar but quite distinct concepts: an acquisition and a distributorship arrangement. The former involves a discrete transfer and relinquishment of stock or assets and, in most situations, results in the disappearance of an independent business entity; the latter involves a contractual relationship between ongoing business enti-

ties.[36] The former may be challenged under Section 7 of the Clayton Act; the latter usually falls under the Sherman Act. *See, e.g., Hoopes* v. *Union Oil Co.,* 374 F.2d 480 (9th Cir. 1967). In short, by agreeing to supply bread to a company to which it already supplied cake, Continental was in no sense "acquiring" any of the company's assets or stock, but was rather entering a contractual relationship with an independent distributor.

The Commission itself clearly recognizes this familiar distinction, for where it has sought to prevent companies from engaging in distributorship arrangements as well as acquisitions, it has negotiated consent orders that include clear and explicit prohibitions of such transactions. *E.g., Textron, Inc.* (FTC Dkt. C-1740, May 22, 1970), *Imperial Chem. Indus., Ltd.* (FTC Dkt. C-2175, March 22, 1972);[37] *Frito-lay, Inc.* (FTC Dkt. 8606, August 28, 1968);[38] *Hercules, Inc.* (FTC Dkt. C-1794, September 23, 1970), *United Indus.*

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[36] As this Court has stated, the amended Section 7 is directed essentially against the range of "corporate amalgamations." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 342 (1963). To be sure, an "asset acquisition" may be limited to only certain assets of the selling company; but "in an asset acquisition, however, the shareholders of the selling corporation . . . retain no interest in the assets transferred." *Id.* at 337. It can hardly be said in this case that Sheppard's distributorship agreement deprives it of a continuing interest in its customer lists, route lists, or any other asset it had previously possessed.

[37] Respondent prohibited from obtaining "the market share, in whole or in part, of [any] concern. . . ."

[38] Prohibition applied where "such [concern] discontinues manufacturing any of said products under a brand name or label owned by such [concern] and thereafter distributes any of said products under any of respondents' brand names or labels."

Syndicate, Inc. (FTC Dkt. C-1860, February 12, 1971).[39] No such provisions or anything like them were included in the present consent order, nor even alluded to in the accompanying agreement.

Thus, as with the question of "holding" assets, the Government is again forced to argue that "acquiring" does not mean what it says, but rather that the term covers mere entry into a supply contract with a firm that has unilaterally ceased production of its own products. There is as little justification for distorting the plain meaning of the consent order language in this respect as there is with regard to the penalty issue. Even if the Court accepted the Government's contention that the "purpose" of the order and of the antitrust laws must be considered in establishing the scope of the order's prohibition, an examination of the order, the complaint on which it is based, and the Appendix to the initial agreement will reveal absolutely no expression of intent by either party to prohibit the supply contracts here in question.

Moreover, such a "purpose" test proves too much in the present context, since it would embrace activities having the same result as the challenged distributorship, but which could not in any sense be considered violations of the consent order. Thus, on the Government's theory the distributorship agreement must be condemned because it resulted in Continental obtaining Sheppard's "market" and "volume" (Pet. App. 7A).

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[39] Prohibition applied where "such concern discontinu[es] the manufacture, distribution or sale of such products and thereafter transfer[s] to respondent customer lists or in any other way mak[es] available to respondent access to customers or customer accounts."

However, Continental clearly could have distributed its own bread products directly to Sheppard's customers, and to the extent it was successful, could thereby have acquired Sheppard's "market" or "volume" without even arguably infringing the consent order. This example graphically illustrates the difficulties that arise when the plain language of a consent order is abandoned in favor of its supposed "purpose."

Finally, the Court of Appeals' reliance upon *United States* v. *Columbia Pictures Corp.*, 189 F.Supp. 153 (S.D.N.Y. 1960), the only decision it cited on this aspect of the case, is clearly misplaced. There, the court found that a film distribution arrangement involving particular films effectively involved an acquisition by the distributor of the suppliers' assets. Even assuming that decision was sound [40] and was not otherwise distinguishable,[41] the approach adopted would if applied here suggest only that Sheppard (the distributor) might have acquired assets of Continental (the supplier), whereas the only transaction forbidden by the consent order is the reverse.

The Court of Appeals agreed with ITT Continental and the Commission that the agreement between Continental and Sheppard was "in all relevant respects, virtually identical to the agreements entered into between Continental, and Bon Ton and Wyoming . . ."

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[40] Compare the same court's subsequent decision in *United States* v. *Allied Chemical Corp.*, 1964 Trade Cas. ¶ 71,193 (S.D. N.Y. 1964).

[41] In Columbia Pictures, a specific set of assets—Universal's pre-1948 copyright feature films—were exclusively confided to the distributor. 189 F.Supp. at 183. The present case involves only a conventional supply contract whereby Continental agreed to provide such bread products as Sheppard might require.

(Pet. App. 6A). The only distinction between Sheppard and the other two transactions is that in the latter cases Continental eventually did acquire the distributorships due to events subsequent to the original transactions. But of course, at the time of acquisition these distributorships were not concerns "engaged . . . in the production and sale of bread and bread-type rolls," and since the express terms of the consent order limited Continental only as to acquisitions of such concerns, the ultimate acquisition of the Bon Ton and Wyoming distributorships were not violations of the consent order.

As the Court of Appeals implicitly recognized, these ultimate acquisitions had no bearing on the initial distributorship arrangements, and thus those arrangements could no more be considered violations than could the Sheppard transaction. Accordingly, Continental's belief that the terms of the consent order permitted such distributorships was not only "reasonable" as the District Court found, but was in fact the only appropriate interpretation of the consent order as it is written. Since there were no violations of the order, daily penalties cannot be assessed.

C. Daily Penalties for Post-Merger Activities Could Not Be Assessed Against ITT Continental Which, as a Bona Fide and Previously Unrelated Successor to Continental, Was Not Subject to the Consent Order "As Written."

The consent order by its terms applied only to Continental and on September 13, 1968, Continental ceased to exist. See p. 5 above. Both lower courts held that daily penalties could not be assessed under the consent order for "retaining" of assets but only for "acquiring" them, and accordingly neither sought to impose such penalties on ITT Continental for retain-

ing forbidden assets after September 13, 1968.[42] If this Court should hold that daily penalties were permitted under the consent order for retaining assets, then it will be necessary for it to decide whether as a matter of law the consent order applied directly to ITT Continental so as to give rise to daily penalties between September 13, 1968, when Continental ceased to exist, and December 13, 1968, when the present suit was filed. Both the language of the consent order and the law on successorships indicates that ITT Continental cannot be so bound.

To determine the successorship issue, it is once again necessary to return to the language of the consent order "as written," and to the principles of *Armour* in interpreting such language. FTC orders which bar future acquisitions (or other activities) often do apply by their terms to "successors" to the respondent company named in the order. For example, the consent order issued in *Cole National Corporation,* 71 F.T.C. 1504, 1510 (1967), applied to "respondent Cole National Corporation, its subsidiaries and affiliates and any successor to substantially all of its assets . . . ." Other orders similarly apply to the respondent and "successors and assigns to any substantial part of its assets,"[43] the "respondent and its successor in interest,"[44] or to

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[42] The penalties were imposed only for "acquisitions" made in 1966 and 1967 when Continental was extant and fully subject to the consent order. ITT Continental, while denying that it was itself subject to the consent order, never contested its liability under the merger agreement for the monetary penalties that had accrued against Continental at the date of merger based on Continental's pre-merger conduct.

[43] *E.g., Gates Rubber Company* (FTC Dkt. C-2137, January 21, 1972).

[44] *E.g., Foremost Dairies, Inc.,* 67 F.T.C. 282, 284 (1965).

the respondent and its "successors and assigns."[45] The instant order contains no such language.

Because *Armour* requires that a consent order be construed in accordance with its terms, there is no basis in the present case for extending the order to apply it to a successor whose subjection to the order was not contemplated by its express terms. The policy underlying the *Armour* decision to protect reliance on the terms of a consent decree as written applies with even more force to the situation here, for the presence of a "successors and assigns" clause in the consent order would at least have put ITT Continental on notice before entering the merger in 1968 that it might itself be bound by the order. To hold now that ITT Continental is indeed bound by such an order which makes no reference to "successors," and by reason of such a holding to subject ITT Continental to a substantially increased penalty, is exactly the type of harm that the policy of construing consent decrees within their four corners is intended to prevent.

That the absence of language applying the consent order to Continental's successors is dispositive here is confirmed by the facts as well as the rationale of the *Armour* decision. In that case the Court held that the provisions of a consent decree which did not purport to bind Armour's "successors and assigns" did not apply to a company that acquired Armour. The Court observed that the Government could have argued that the acquiring company was bound by the order "[i]f a 'successors and assigns' clause had been included . . . ." 402 U.S. at 680. The absence of such a clause in the

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[45] *E.g., Hercules, Inc.* (FTC Dkt. C-1794, September 23, 1970).

order in this case must, as it did in *Armour,* preclude the application of the order to a successor.[46]

Even assuming that the absence of a "successors" clause in the instant consent order were not dispositive of the successorship issue, ITT Continental as a bona fide and previously unrelated successor to Continental cannot be bound by the order directed solely against Continental. A long line of precedents in both the courts and the Commission confirm that a company cannot be bound by an order entered against its predecessor unless there is substantial continuity of ownership and management, so that the the successor appears to be merely a means of avoiding the order's requirements.[47] These decisions have typically involved situations where a family-owned corporation is dis-

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[46] *Regal Knitwear Co.* v. *NLRB,* 324 U.S. 9 (1945), cannot aid the Government here. That case simply held that the inclusion of a "successors" clause in a *litigated* decree could not *enlarge* the scope the order would have by virtue of Rule 65 of the Federal Rules of Civil Procedure. *Armour* established the distinction between litigated and consent orders, and held that in the latter the absence of a "successors" clause was relevant in determining whether the parties had agreed to bind successors. To the extent that the two cases cannot be reconciled on this ground, *Armour* must be deemed to have qualified *Regal Knitwear sub silentio,* for the holding in *Armour* rejected the argument expressly made by the Government that under *Regal Knitwear* the absence of a "successors" clause was irrelevant. *See* Brief for the United States, p. 27 & n. 17, *United States* v. *Armour & Co.* (O.T. 1969, No. 103), incorporated by reference in Jurisdictional Statement of the United States, p. 3, *United States* v. *Armour & Co.* (O.T. 1970, No. 759).

[47] *See, e.g., Walling* v. *Reuter,* 321 U.S. 671 (1944); *NLRB* v. *Tempest Shirt Manufacturing Co.,* 285 F.2d 1 (5th Cir. 1960); *P. F. Collier & Son Corp.* v. *FTC,* 427 F.2d 261 (6th Cir.), *cert. denied,* 400 U.S. 926 (1970). *A&M Karagheusian, Inc.,* 68 F.T.C. 452 (1965); *Avon Publications, Inc.,* Trade Reg. Rep. ¶ 18,861 (FTC 1969). *See also, Regal Knitwear Co.* v. *NLRB, supra,* at 14-15.

solved but continues unchanged under the same ownership; where the successor firm is wholly owned by the owner of the company initially subject to the order; or where a pre-existing subsidiary company is succeeded by the parent or another subsidiary. In such instances, the continuity of ownership and control permits an inference that the reorganization was accomplished at least in part for the purpose of escaping the restrictions of an order, thereby justifying an extension of the order against the successor.[48]

The facts of the present case do not even remotely resemble the situations described above. It is undisputed that:

(a) The merger between ITT Continental and Continental was the result of "protracted arms-length negotiation" between two previously unrelated and independent companies, neither of which owned stock in the other (App. 32-33);

(b) "The merger was to no extent whatever entered into or consummated for the purpose of evading the consent order in any way" (App. 33);

(c) There has been a major change in management control from a situation where Continental's officers constituted a majority of Continental's board of directors to a situation where ITT Continental's

[48] Thus, in *Walling* v. *Reuter, supra*, a case heavily relied upon by the Government below, the Court found appropriate circumstances to bind a successor where it appeared that a family-owned business "successfully avoided all responsibility for compliance with the judgment entered against the family corporation, by the simple expedient of dissolving it and continuing the business under the individual control of members of the family . . . ." 321 U.S. at 675.

officers do not constitute a majority of the board (App. 33-34); and

(d) As a direct result of the merger there has been a major change in ownership from a situation where Continental's more than four million shares of stock were owned by more than 11,000 persons, no one of which owned more than 4 percent, to a situation where all of ITT Continental's stock is owned by a single person, ITT (App. 33).

These undisputed facts show that the merger was a bona fide and arms-length business transaction. They show that the merger was not accomplished to evade the consent order, and that there was no substantial continuity in the ownership and control of Continental as a result of the transaction. Accordingly, the policies which have led courts to bind successors to orders issued against their predecessors do not exist in this case, and quite apart from the absence of a "successors" clause in the present consent order, ITT Continental cannot be bound by the order.

Finally, ITT Continental cannot be subjected to the consent order against Continental on the ground that it succeeded to the "liabilities" of Continental under the terms of the merger. Although such a theory was suggested by the District Court's opinion (compare Pet. App. 16A), in the Court of Appeals the Government sought to minimize this contention,[49] and it was not adopted by the Court of Appeals. In fact, this theory is supported neither by reason nor by precedent.

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[49] In its reply brief below (p. 39), the Government argued that it was "wrong" to read the District Court opinion as making ITT Continental's contractual assumption of liabilities the decisive factor in determining whether it was bound by the consent order.

The record in this case does not support the conclusion that ITT Continental gratuitously assumed, for the benefit of the Commission, an obligation to comply with Commission orders which would not have existed but for such an assumption. Nor can any such commitment be inferred from a general undertaking to assume the "liabilities" of Continental which, in the context of a merger, necessarily refers to its normal, outstanding financial debts and obligations. Surely, if a successor agreed before sentencing to assume the "liabilities" of a convicted criminal, one would not expect the successor to serve the jail sentence, but only to pay the debts.

As already noted, ITT Continental did not dispute its financial liability for alleged violations of the consent order committed by Continental prior to the merger, but this alone cannot justify any holding that ITT Continental itself became subject to the order after the merger so that new, daily penalties could arise based on its conduct from the date of the merger. The Government has, indeed, cited no case in which a bona fide and previously unrelated successor by merger has been held as such to be bound by an order against a predecessor company that has been dissolved as a result of the merger. Accordingly, daily penalties even if otherwise permitted cannot be assessed against ITT Continental with respect to post-merger activities.

D. The Commission May Not Recover Daily Penalties for Periods After It Reasonably Should Have Informed Continental or ITT Continental of the Asserted Violations.

There is a final important issue that must be resolved if this Court decides that ITT Continental can be held liable for continuing violations of the consent order.

In this case, the Commission, despite full knowledge of the facts underlying the challenged transactions, and despite a final decision to certify those facts and a draft complaint to the Attorney General, never informed Continental or ITT Continental prior to the filing of the complaint that the Commission regarded the three transactions to be continuing violations of the consent order. Fundamental considerations of fairness and due process of law, as well as the Commission's own procedures, prohibit the Commission from asserting daily penalties for a period during which it has had available all the relevant facts pointing to an alleged violation, but has needlessly allowed those penalties to accumulate by failing to advise the party subject to the order of its potential liability.

Although the Commission had completed its factual inquiries to Continental regarding the distributorship arrangements by June 1967 (see p. 7, above), it was not until 14 months later that the Commission certified to the Attorney General its contention that the order had been violated and that the violations were continuing. Continental had voluntarily cooperated with the investigation (*e.g.,* App. 114-116). One month after certification of the facts and the draft complaint to the Attorney General, ITT acquired the stock of Continental and merged Continental into ITT Continental. Yet, not until this action was commenced in December 1968 did ITT Continental become aware that the Commission believed a violation had occurred and was continuing.

The District Court correctly ruled that it would be "unreasonable" to allow the Commission "to knowingly let daily penalties accrue without giving notice of the

Commission's position at the earliest reasonable time" (Pet. App. 15A). This determination accords fully with sound policy. Absent such a warning, a respondent can easily be "mouse trapped" into a potential liability for virtually millions of dollars.[50] Not only is there no excuse for failing to give a respondent notice of the Commission's position at the earliest reasonable time, but there is a strong public justification in favor of doing so since notice will encourage a respondent either to abandon the challenged conduct or to take prompt measures to secure a definitive determination whether the conduct is lawful. See p. 56 below.

In amending the applicable statutes to permit daily penalties, Congress certainly did not contemplate that the daily penalty provisions should be used to permit the accumulation, without notice, of huge and ever increasing penalties, after the Commission has been apprised of the conduct it deems to violate its order. Indeed, the danger of such excessive penalties was raised by at least one Congressman in the Committee hearings directed to the 1959 amendment which added the daily penalty to the Clayton Act. In addition to assuring the Committee that actions for daily penalties were extremely rare, the Commission spokesman responded by testifying that "We never yet have requested a certification [to commence a penalty action] without first notifying the respondent that he is considered to be in violation and affording him an opportunity . . . to come in and discuss the matter . . . ."

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[50] For example, in this case, the 19 month delay would, at the $1,000 per day penalty sought by the Government, represent over $1.7 million in unnecessary and unjustified penalties. At the present maximum statutory penalty, the amount would be over $17 million.

Hearings on Finality of Clayton Act Orders, supra, at 22.

At the very least, therefore, the daily penalty provisions should not be construed to authorize the accumulation of daily penalties from and after the earliest point when the Commission reasonably could have given the respondent notice of its position. This view fully accords with the settled principle that statutes should be construed to avoid unfairness or oppression, *e.g., Carlisle* v. *United States,* 83 U.S. (16 Wall.) 147, 153 (1872), and this canon has been followed even in cases where the statutory language did not easily comport with such a solution. *E.g., Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285-87 (1956). Nothing in the language of the daily penalty provisions precludes this reading and, as already noted, it will necessarily serve the public interest by resolving such controversies at the earliest possible time.

The limitation recognized by the District Court derives not only from public policy and a sound reading of the statute but from the Constitution itself. Due process does not permit an agency, without any justifiable excuse, to sit idly by for nineteen months allowing the continuation of conduct known to the agency and believed by it to be unlawful and then to assess and collect daily penalties for the conduct during that same period. Administrative conduct so arbitrary, unreasonable, and prejudicial to a respondent must be deemed to be forbidden by the Fifth Amendment.

Moreover, the due process obligation to provide such notice is greatly enhanced where, as here, there was and continues to be reasonable doubt whether the con-

sent order forbids the transactions in question.[51] It is well established that a penalty may not be imposed where the governing standard of conduct is such "that men of common intelligence must necessarily guess at its meaning and differ as to its application."[52] This principle clearly applies to FTC consent orders and, at least where reasonable doubt about their application exists, precludes the collection of daily penalties in the absence of proper notice. *See United States* v. *Beatrice Foods Co., supra,* 493 F.2d at 1269. The Commission's failure to notify ITT Continental at the earliest reasonable time not only subjected the company to the risk of substantial penalties despite its "reasonable" reading of the order, but it also denied the company the opportunity to limit the accrual of substantial penalties by anticipating the penalty action with a declaratory judgment action of its own or by other appropriate measures. *E.g., St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 225-26 (1961); *Conti-*

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[51] Here, the District Court specifically found that ITT Continental's reading of the consent order was "reasonable" (Pet. App. 14A). This appraisal is further confirmed by the action of the District Court for the District of Columbia in *National Dairy Prods. Corp.* v. *F.T.C.*, Civ. No. 1071-68 (D. D.C. 1968). There the FTC sought to use the anti-acquisition clause in a consent order to preclude distributorship arrangements and, in the captioned civil action, the District Court found this construction sufficiently dubious that a preliminary injunction against the Commission was justified. The opinion of that court is set forth at pp. 55-56 of ITT Continental's brief in the court below in this case.

[52] *See Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961), quoting from *Connolly* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966); *Champlin Ref. Co.* v. *Corporation Commission of Oklahoma,* 286 U.S. 210 (1932).

nental Baking Co. v. *Dixon,* 283 F.Supp. 285 (D. Del. 1968).[53]

In the court below, the Government did not in substance deny that the Commission should advise a respondent of the Commission's position at the earliest reasonable time. Rather, in its opening brief (p. 45) it suggested that the trial court could as a matter of discretion reduce the penalty otherwise applicable to compensate for any undue delay, and it repeats this suggestion in its opening brief in this Court (Gov. Br. 27). The question here, however, is not whether a lesser penalty may be imposed as a matter of judicial discretion; it is whether, as a matter of law, daily penalties of any amount are precluded from and after the point when such notice should have been given. As we have shown, public policy, Congressional understanding, and due process itself require an affirmative answer.

CONCLUSION

For the reasons stated in Part II of this brief, the judgment below denying daily penalties should be affirmed on the ground given by the lower courts. Alternatively, if the lower courts are found to have

[53] In *Dixon*, the court held that:

> "The Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. § 45(l) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process." *Id.* at 287-88.

Here, ITT Continental urges only that the failure to give such notice precludes assessing daily penalties after "the earliest reasonable time" at which the Commission could have given notice.

erred, this Court should nevertheless affirm the denial of daily penalties (or appropriately limit such penalties) on the alternative grounds set forth in Part III of this brief.

Respectfully submitted,

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